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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

## No. 394

HERMAN DAVID,

*Petitioner,*

vs.

THE UNITED STATES OF AMERICA,

*Respondent.*

## PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:*

This Reply Brief is required to correct some inaccurate statements appearing in the Government's Brief, which are not justified by the record.

For instance, at page 3 of its Brief, the Government states that Witness Hambach "was told by a reliable informer named Willie Jones, whose information Hambach had used on previous occasions, that petitioner had been delivering alcohol to 4502 Vincennes Avenue in Chicago (R. 59)."

Again, at page 6 of its Brief, the Government states that its agents had "reliable information from a *previously tested informer* that petitioner had been delivering alcohol at a known speakeasy where successful raids had been made."

The actual testimony of Government Witness Hambach is: "We had received information from a reliable source that he was delivering alcohol to this address." The reliable source was an informer whom the witness knew as Willie Jones, but didn't know where Willie Jones lived. Willie Jones used to call him from time to time, and Hambach would meet Willie Jones at appointed places on the South side (R. 59).

Calling an informer a reliable source of information is a conclusion. But testifying that the informer *had been previously tested,* and had been found reliable, may be an element in determining probable cause. Apparently the Government made its inaccurate statements in its Brief, knowing that the accurate testimony could not be considered as an element of probable cause. The agents had no evidence whatever from any source, including Willie Jones, that the defendant, on November 20, 1953, was about to deliver, or intended to deliver, alcohol to 4502 Vincennes Avenue (R. 59, 60).

At page 6 of the Government's Brief, it states as an element of a "composite picture" that the "surveillance of petitioner on one occasion when he *surreptitiously* took *two loaded shopping bags into the speakeasy*, and then emerged with empty bags." According to Witness Hambach, this incident took place in broad daylight and not surreptitiously. On the day in question, November 6th, at 8:00 o'clock in the morning, he saw the petitioner drive his automobile to the intersection of South Park and 45th Street at which point he contacted Investigator Fletcher by radio (R. 44, 45). The testimony of Agent Fletcher is

that he saw the petitioner get out of the car, look around, and take two shopping bags out of the rear of his automobile, and that the petitioner took them into the side entrance of the building at 4502 South Vincennes Avenue. There was *no* testimony that petitioner took the bags *into a speakeasy*. Ten minutes later he came out with two empty shopping bags (R. 74). Fletcher didn't look in the shopping bags (R. 80), nor make an arrest of the petitioner at that time, nor did he seek a search warrant for the search of the premises at 4502 Vincennes Avenue, nor make an arrest at that address (R. 80). It was his duty to make an arrest if he saw a violation of the law.

There is no evidence as to what the shopping bags contained when petitioner carried them into 4502 Vincennes Avenue, nor any evidence that they were "loaded." There was nothing in the carrying of these shopping bags that could give rise to even a suspicion that they held containers of alcohol.

At another point, as an element of probable cause to make a search by the agents, the Government states, at page 6 of its Brief, that the agents had knowledge "from their sense of sight that the shopping bags in petitioner's automobile parked near the speakeasy contained jugs with a liquid which was *probably* alcohol." The use of the word "probably" in the foregoing statement defeats the Government's contention that the agents had any knowledge from their sense of sight that the shopping bags contained jugs of alcohol. The Government overlooks the positive testimony of Agent Roseboro that he saw the *necks* of two jugs but did not see the liquid at the time (R. 66). He testified he did not see any moonshine in the car before the search or prior thereto (R. 66, 67). At the time of the search he either had to taste the liquid or smell it before he knew that distilled spirits were in the car and he, there-

fore, put his finger in one of the bottles in order to taste it and to smell it (R. 67).

On the basis of the accurate facts testified to by the Government witnesses, as they appear in the record, there was no probable cause for making a search of petitioner's car. On the exaggerated and inaccurate statements of the essential facts appearing in the Government's Brief, there could be probable cause for the search. This situation in which the Government feels it necessary to urge inaccurate facts in order to clothe the agents with probable cause for making the search and seizure, is an emphatic concession that the true facts appearing in the record did not justify the search, and that the agents had no probable cause to make the same.

With respect to the destruction of the jugs and the shopping bags, the Government overlooks the point urged by the petitioner in his Petition for Certiorari. The Government justifies the failure to produce the shopping bags and the jugs by a custom in the Alcohol Department of destroying such material, if, in the opinion of the department, they will not be necessary for evidence in a trial. This custom was sanctioned and justified by the Court of Appeals for the Seventh Circuit in its opinion. The point urged by the petitioner is that such a custom should not receive the sanction of a Court of Appeals; that it is not within the province of the Alcohol Department to determine what evidence should or should not be produced.

There was a conflict of testimony as to the comparative size of the jugs and the shopping bags. The petitioner urged that the tops of the shopping bags were so far above the tops of the jugs that one could not see any liquid in the jugs. At page 4 of the Government's Brief, in a footnote, its attorneys state:

> "The agents estimated the height of the bags as between 12 and 24 inches, and the height of the jugs

as between 10 and 12 inches (R. 58, 68). Petitioner testified that the jugs were about 11 inches high, and that the tops of the bags were about 8 or 10 inches above the tops of the jugs (R. 35)."

Agent Roseboro estimated that the bags were 10 or 12 inches in height (R. 69). If that was a fact, the jugs could easily have been seen, since Agent Hambach testified that the jugs were 10 to 12 inches in height. But Agent Roseboro, on a previous occasion, testified that the bags were two feet in height and that his recollection at that time was better than at the time of his current testimony (R. 70).

The petitioner again emphasizes that the Government agents should not be the judges of what evidence should be retained and produced in Court, and what evidence might be destroyed and not produced in Court.

With respect to the opinion in the case of *United States* v. *Walker*, set forth in full at pages 6-A to 23-A, the Government states in the footnote at page 7 of its Brief: "While the court below refers to *Walker*, it does not treat that case as directly in point on its facts, but merely as enunciating some general principles applicable." This note of the Government overlooks that the opinion of the Seventh Circuit recited that much of what it said in the *Walker* opinion "governs the deposition of this appeal" (Pet. App. 1-A). The case of *United States* v. *Walker* again is cited at page 2-A of the Petitioner's Appendix to support the Seventh Circuit statement, "The strong showing of probable cause dissipates any doubt about the correctness of denying the defense motion to suppress the evidence."

Respectfully submitted,

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